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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 559.

CITY OF HARRISONVILLE, MISSOURI,
PETITIONER,

VS.

W. S. DICKEY CLAY MANUFACTURING
COMPANY, RESPONDENT.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF PETITIONER.

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INDEX

Specification of Errors 1

Supplement to Statement of Facts—

- The Imhoff Tank 5
- The Construction and Operation of the Settling Chambers 6
- The Digestion Chamber 7
- Sludge Removal 8
- Secondary Treatment 9
- Difficulties of Imhoff Tank Inherent 9
- Respondent's Farm Improvements 10
- Value of the Land 10
- Construction of Sewer Plant Not Defective ... 11

Issues of This Review 12

- Matters of General Law (with segregated citations) 12
  - Permanent or Temporary Nuisance 12
  - Judicial Invasion of Legislative Powers .. 14
  - State Constitutional Revenue Limitations 15
  - Balanced Equities 16
- Matters of Local Law 16

Rebuttal—

- Right of Sewage Disposal 18
- Condemnation 18
- Respondent's Citations upon the Subject of Permanent or Temporary Nuisance 22

Judicial Interference with Legislative Functions 51
Financial Powers of the City 56
Balanced Equities 70

Conclusion 70

Appendix—

A. Section 7032, R. S. Mo., 1929 (District Sewers) 71
B. Section 11, Article X, Constitution of Missouri (Rates of General Tax Levy) 73
C. Section 12, Article X, Constitution of Missouri (Limitations on Debt Making Power) 75
D. Section 12a, Article X, Constitution of Missouri (Exceptions to Section 12) 81

CASES CITED

Anderson vs. Ripley Co., 181 Mo. 46, 80 S. W. 263, l. c. 267 15

Baltimore & Potomac R. R. Co. vs. Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739 .. 23

Baltimore & Potomac R. R. Co. vs. Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784 24

Barton vs. City of Odessa, 109 Mo. App. 76 21

Bartlett vs. Grasselli Chemical Co., 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54 (1922) 13

Battle vs. Wilcox, 128 S. C. 500, 122 S. E. 516.. 63

Blankenship vs. Kansas Explorations, Inc., 325 Mo. 998, 30 S. W. 2nd 471 (1930) 13

Bliss vs. Washoe Copper Co., (C. C. A. 9th Cir. 1911) 186 Fed. 789, 109 C. C. A. 133 16

Bollinger et al. vs. American Asphalt Roof Corporation, 224 Mo. App. 98, 19 S. W. 2nd 544 (1929) 13, 26

Brooks vs. Schultz, Tax Collector, 178 Mo. 222, 77 S. W. 861 16

Carmichael vs. City of Texarkana, 94 Fed. 561 40

Chapman vs. City of Rochester, 110 N. Y. 273, 18 N. E. 88 39

City of Ardmore vs. Colbert, 52 Okla. 235, 152 Pac. 603 49

City of Cape Girardeau vs. Hunze, 314 Mo. 438, 284 S. W. 471 (1926) 13, 21

City of Oklahoma City vs. West, 155 Okla. 63, 7 Pac. (2d) 888 ..... 31, 43

City of Tecumseh vs. Deister, 112 Okla. 3, 239 Pac. 582 42

Comor vs. City of Nevada, 188 Mo. 148, 86 S. W. 256 ..... 15, 58

Concord vs. Morgan, 74 N. H. 32, 64 Atl. 725 63

Des Moines Nat. Bank vs. Fairweather, 44 S. Ct. 23 17

Donahoe vs. Kansas City, 136 Mo. 657, l. c. 666 14

Edmondson vs. City of Moberly, 98 Mo. 523, 11 S. W. 990 25

Green vs. Lessee of Neal, 6 Peters 291 17

Haeussler Investment Co. vs. Bates, 306 Mo. 392, l. c. 407-412, 267 S. W. 632, l. c. 634-636 14

Hancock vs. City of Muskogee, 39 S. Ct. 528 17

Harbison vs. City of Hillsboro, 103 Ore. 257, 204 Pac. 613 42

Hayes vs. Railroad, 177 Mo. App. 201, 162 S. W. 266 13

Horine vs. People's Sewer Co., 200 Mo. App. 233, 204 S. W. 735 (1918) 13

Howell vs. Boston Academy of Notre Dame, 130 Mass. 209 63
Jackson vs. Chew, 12 Wheat. 153 17
Jones vs. Prairie Oil & Gas Co., 47 S. Ct. 338, 273 U. S. 195, 71 L. Ed. 602 17
Jones vs. Sewer Improvement Dist. No. 3, 119 Ark. 166, 177 S. W. 888 31
Kansas vs. Colorado, 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956 16
Kent vs. City of Trenton, Missouri, not officially reported, 48 S. W. 2nd 571 13
Lamar Water & Electric Light Co. vs. City of Lamar, 128 Mo. 188, 31 S. W. 756 .....16, 63
Livingston vs. Jefferson, Fed. Cas. No. 8411 17
Mangum vs. Sun Set Field, 73 Okla. 11, 174 Pac. 501 49
McCarthy vs. Bunker Hill and Sullivan Mining Co., (C. C. A. 9th Cir. 1908) 164 Fed. 927, 92 C. C. A. 259 16
McLaughlin vs. City of Hope, 107 Ark. 442, 155 S. W. 910 34
Mining Company vs. City of Joplin, 124 Mo. 129, 27 S. W. 406 22
Morse vs. City of Worcester, 139 Mass. 389, 2 N. E. 694 38
New York City vs. Pine, 185 U. S. 93, 22 S. Ct. 592, 46 L. Ed. 820 .....13, 16, 50
Page vs. Oklahoma City, 129 Okla. 28, 263 Pac. 448 49
Parker vs. Winnispiseogee Cotton and Woolen Co., 67 U. S. 545, 17 L. Ed. 333 16
Rhodes vs. Durham, 165 N. C. 679, 81 S. E. 938 (1914) 13
Sacks vs. Legg, 219 Ill. App. 144 .....16, 63
Scott vs. City of Marshall, 223 Mo. App. 596, 14 S. W. (2d) 694 23

Seattle vs. Lloyd's Plate Glass Ins. Co., 253 Fed. 321, 165 C. C. A. 103 36

Sewerage Dist. No. 1 vs. Black, 141 Ark. 550, 217 S. W. 813 36

Small vs. Partway Auto Supplies, Inc., 154 N. E. 521 ..... 16, 63

Smith vs. Sedalia, 244 Mo. 107, 149 S. W. 597 (1912) 13

Smith vs. Stasco Milling Co., 18 Fed. 2d 736 17

Standard Oil Co. vs. Marysville, 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856 (C. C. A. 8th Cir.) 14

State ex rel. vs. City of Willow Springs, 183 S. W. 589 ..... 15, 58

State ex rel. vs. Hackman, 287 Mo. 184, 229 S. W. 1078 15

State ex rel. vs. Town of Columbia, 111 Mo. 365, 20 S. W. 90 ..... 16, 63

State ex rel. vs. University City, 320 Mo. 451, 8 S. W. 2d 13 ..... 15, 58

Sullivan vs. American Manufacturing Company of Mass., (C. C. A. 4th Cir. 1929) 33 F. 2d 690 17

Sussex Land & Live Stock Co. vs. Midwest Refining Co., (C. C. A. 8th Cir. 1923) 294 Fed. 597, 34 L. R. A. 249 ..... 13, 16, 50

Swanson et al. vs. Bradshaw, (Mo. App. 1916) 187 S. W. 268 23

Swift vs. Tyson, 16 Peters 1 17

Texas and Pacific R. R. vs. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385 (1890) 13

Thurston vs. The City of St. Joseph, 51 Mo. 510, l. c. 519 14

Union Trust Co. vs. Pagenstecher, Tax Collector, 221 Mo. 121, 119 S. W. 1103 ..... 15, 58, 65, 68

Van Baman et al. vs. Gallagher, 182 Pa. 277, 37 Atl. 832 63

Winona vs. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204 36
Woodson vs. The City of Kansas, 58 Mo. App. 272, l. c. 278 14

TEXT BOOKS

Corpus Juris on Injunctions, Vol. 32, p. 81 13
Corpus Juris on Injunctions, Vol. 32, p. 260, Sec. 410, also p. 250, Sec. 391 14
Corpus Juris on Mandamus, Vol. 38, p. 756, Sec. 386 14
Corpus Juris on Municipal Corporations, Vol. 43, p. 299, Sec. 314, also Vol. 44, p. 154, also Vol. 44, p. 1084, Sec. 4002 14
Corpus Juris on Municipal Corporations, Vol. 43, p. 956, Sec. 1734 ..... 14, 35
Corpus Juris on Nuisance, Vol. 46, p. 775, Sec. 385, also p. 804 ..... 13, 16, 50
McQuillan on Municipal Corporations, 2nd Ed., Vol. IV, p. 325, Sec. 1562, also Sec. 2871 14

STATUTES

R. S. Mo. 1919, Secs. 8354-8371 21
R. S. Mo. 1929, Secs. 6872-6898 21
R. S. Mo. 1929, Sec. 7023 ..... 18, 21
R. S. Mo. 1929, Sec. 7031 ..... 65, 67
R. S. Mo. 1929, Sec. 7032 71
R. S. Mo. 1929, Sec. 7276 69
R. S. Mo. 1929, Sec. 7079 20
R. S. Mo. 1929, Sec. 7090 21
Sec. 11, Art. X, Const. Mo. 15, 73
Sec. 12, Art. X, Const. Mo. 15, 64, 75, 81

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W. S. DICKEY CLAY MANUFACTURING COMPANY, RESPONDENT.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SPECIFICATION OF ERRORS.

Both courts below erred:

I.

In failing to dismiss the respondent's petition in accordance with petitioner's request made at the beginning of the trial, upon the ground that the structure in question, if a nuisance at all, was a permanent nuisance and not subject to an action in equity (see Assignment of Errors I, R. 18, and trial proceedings, R. 35).

II.

In failing to sustain the objection of petitioner to the evidence of the respondent concerning methods of secondary treatment for sewage, the ground of such objection being that the right to determine the type of sewage disposal plant to be erected lay within the province of the legislative representatives of the city and beyond the province of the court to modify it (see Assignment of Errors V, R. 19, and trial proceedings, R. 49 and 50).

III.

In failing to sustain the objection of petitioner to the evidence of respondent concerning secondary treatment for the effluent from the disposal plant in question, the ground of said objection being that the character of the disposal plant was a matter for determination by the city authorities within their discretion, and not a matter for determination by the court, and that if any nuisance had been created by such disposal plant the remedy of the property owner in such case was an action for damages as for a permanent nuisance (see Assignment of Errors VIII, R. 20, and trial proceedings, R. 63).

IV.

In failing to sustain the motion made by petitioner, at the close of respondent's case, to dismiss said action, the ground of said motion being that under the pleadings and the law and the evidence it appeared that respondent had no such cause of action as it sought

to assert, that if any injury arose to respondent's land from the operation of the disposal plant in question, such injury was inherent in the use of the plant from its very beginning, constituting the same a permanent nuisance, and that the relief of the land owner for such invasion, if any, of its rights, was an action at law for damages for the diminution of the value of its land by reason of the operation of said plant, and that said plant served the general public convenience and must, as against an individual asserting property damage, be held, if held to be a nuisance at all, a permanent nuisance, for which equity provided no relief, but for which the land owner was remitted to an action for damages as for a permanent nuisance; and further, upon the ground that under the petition and the evidence it appeared that respondent sought an order modifying the present disposal plant, notwithstanding that such an order was beyond the jurisdiction of the court, and notwithstanding that respondent's evidence failed to show that petitioner was financially able to construct such a supplementary plant, or that under the condition of its finances and the limitations of the Constitution of the State of Missouri it had the financial means or the power to build such a secondary plant (see Assignment of Errors XI, R. 20, and trial proceedings, R. 70).

V.

In entering a finding and decree in favor of the respondent which was erroneous for the following reasons (see Assignment of Errors XIII, R. 21, and Decree, R. 15):

A. (Omitted here.)

B. (Omitted here.)

C. (Omitted here.)

D. (Omitted here.)

E. (Omitted here.)

F. (Omitted here.)

G. Because the decree in effect required that petitioner erect an additional and supplementary disposal plant, and thus invaded the legislative powers and discretion of petitioner.

H. Because equitable relief thus awarded respondent was unsupported by the pleadings and the evidence which showed that the structure in question, if a nuisance at all, was a permanent nuisance, for any resulting damage from the operation of which the only proper action was an action at law by the owner of the property affected for original damages.

I. Because the decree ignored the financial and constitutional limitations upon the petitioner preventing its compliance with the requirements in the decree for the erection of a supplementary plant.

J. Because the decree ignored the preponderating public convenience and necessity served by the structure in question when the complaint against the same was based upon mere property damage.

K. Because the decree inequitably required of the petitioner an expenditure of from $25,000.00 to $40,000.00, when the property damage complained of by respondent amounted to only $100.00 a year.

SUPPLEMENT TO STATEMENT OF FACTS.

The Imhoff Tank.

Imhoff tanks have been in use in Missouri about ten years, although they have been in use in Germany and other states of the United States somewhat longer. They are generally recognized as a marked improvement over the old septic tank method of disposal (R. 65, 76, 52). A statement of the design and operation of an Imhoff tank can best be followed in connection with a study of Defendant's Exhibit B, pages 2 and 3 (R. 161 and 163).

The method of operation is briefly this (R. 77-80). Take page 2, Exhibit B (R. 161), which starts at the top of the page with the distribution manhole, into which from points east beyond the top of the sheet has been brought the City sewage by the intake pipe. Out of the bottom of this manhole lead three lines of pipe running west. The longer one known as the bypass leads to another manhole just north of the west end of the tank. This bypass normally is kept closed and performs no function in the sewage disposal (R. 78, 80, 88). The two shorter pipes are always open and lead west to and enter the east end of the concrete constructed Imhoff tank, discharging near the top of the tank, one line into its north settling chamber and the other into its south settling chamber. The tank, inside measurement, is about 23 feet deep and 20 feet long by 21

feet wide, and is divided into three rectangular compartments running the east and west way of the tank, two side compartments each 20 feet long by 8 feet wide, called the settling chambers, and a central compartment 20 feet long by 4 feet wide, called the digestion chamber. However, as is seen from cross section AA (R. 163), these three compartments toward the bottom of the tank all open into one another.

The Construction and Operation of the Settling Chambers.

The first intake of sewage fills the tank to the level of the two tank intake pipes indicated by the small circles on the cross section AA. Thereafter the sewage continues to flow into the east end of the tank, and in the same volume but of a different character to overflow at the west end of the tank in a knife blade stream over a weir into a trough which carries it to the collection manhole just north of the tank.

When the sewage enters the east end of the tank's two settling chambers, it becomes part of the very large body of sewage imperceptibly moving toward the west end. The solids in this practically still sewage immediately begin settling to the bottom of the tank and because of its sloping sidewalls, cross section AA (R. 163), are deposited finally directly under the middle or digestion chamber. Further impeding the westward movement of the sewage is a baffle which runs across each of the settling compartments near the west end. This is a solid wall reaching above the water line but extending downward only

a foot or two. The surface sewage does not flow over this but flows under it after losing much of its solid matter. That liquid sewage which comes under the baffle gradually rises and as before described passes in a knife-blade stream over the weir. Thus of the sewage that entered only the liquid part, with possibly very fine particles of matter held in suspension, particles so fine as to be hardly perceptible to the eye, flows over the weir on its way to the collecting manhole north of the tank.

The Digestion Chamber.

We have already seen from cross section AA (R. 163) how the solids are precipitated by the sloping walls of the settling chambers into the bottom of this great concrete hopper and directly under the middle or digestion chamber. This deposit, called sludge, accumulates here and ferments in which process it gives off gases that rise through the liquid and escape into the open air from the surface of this digestion compartment, which, by the way, unlike the two side compartments has no flow escape over the west end of the tank. Since the gas tends to rise perpendicularly and since the sludge level is kept down to a level from which perpendicularly rising gas would either pass up directly to the surface of the digestion chamber, or, coming in contact with the inner surface of the outward sloping walls of the digestion chamber (R. 163) be forced inward in order to get upward, all the gas from the fermenting sludge rises to the surface of the digestion chamber. It is the contents of this digestion chamber that con-

stitute the most noxious part of the sewage, a part that never gets into the watercourse.

Sludge Removal.

Of course, there must be a method of removing decomposed sludge from time to time from the digestion chamber. For this purpose an eight inch iron pipe closed at the top and supported from the sides of the digestion chamber is suspended perpendicularly over the central and very deepest part of the tank, cross section AA (R. 163). Its lower end is open and rests on flanges coming within about one foot of the bottom of the tank. About three-fourths of the way up this pipe but still well below the water line is a connecting eight inch pipe leading horizontally out of the tank to a point of discharge over the sludge bed, which is just west of the tank. This last pipe has a gate valve ordinarily kept closed. At intervals of two or three months (R. 79), however, as sludge has accumulated in the bottom of the tank under the digestion chamber this valve is opened by hand for a short time and by the simple hydraulic pressure of the tank contents the sludge is forced from the tank to the sludge bed. Then by hand the gate valve is closed. In the sludge bed this deposit is exposed to the air and the liquid in it is drained off through a filtering process underneath shown on the left-hand part of cross section BB (R. 163) west of the tank. The sludge remaining in this sludge bed eventually becomes a kind of gray powder and is shoveled off from time to time.

Secondary Treatment.

This is a primary treatment of the sewage which removes from it about sixty per cent of the putrescible matter (R. 51, 77, 86). To add to this a secondary treatment would be to take the effluent now discharged from the plant and, before discharging it into some natural drain, subject it to further purification by an activated sludge plant, a sand filter or a trickling plant (R. 50). Such a plant of combined primary and secondary treatment would accomplish a total removal of about ninety per cent of the putrescible matter (R. 95), leaving still about ten per cent to be carried away by natural drainage.

Difficulties of Imhoff Tank Inherent.

Respondent's proof was to the effect that, while an Imhoff tank very properly serves for the primary treatment for sewage, it should be supplemented by a plant for secondary treatment; that it is not possible to operate the Imhoff tank of the City of Harrisonville so that its discharge will not pollute Town Creek; that the failure to remove from the sewage more than sixty per cent of putrescible matter thus leaving forty per cent to be carried off into Town Creek is inherent in the character of such a tank even when properly operated; that this was true from the very first day that the tank was built and put into operation and that nothing more could have been expected of it (R. 52).

Respondent's Farm Improvements.

The house, silos, barns and farm improvements referred to by respondent are all in another and larger pasture across on the east side of the railroad track (R. 39), having an independent water supply of its own (R. 38) and merely connected at one point with the pasture in question by gates and a pass over the railroad tracks (R. 43). The statement that the pasture drained by Town Creek is the heart of the farm is not justified by the facts. The total acreage of the farm on both sides of the railroad tracks is about 300 acres (R. 36), of which only about 100 acres on the west side of the tracks are affected by the sewer discharge (R. 61, 181). The land affected may be identified (R. 36) on Plaintiff's Exhibit No. 1 (R. 141) as "Kunze 18 A" (meaning 18 acres) and "F. Deacon 14.71 A" and "M. Deacon 31.64 A." None of this land on the west side of the tracks bears any improvements except the fences (R. 43, 59) and a pond fed by a spring (R. 62). For a good water supply in this west pasture respondent has this pond and the stream above the sewer outlet, neither of which is affected by the sewer discharge. Respondent says the cattle do not drink the water of Town Creek below the outlet (43).

Value of the Land.

The total value of the 100 acres affected, without any pollution of the stream, was only $60 per acre (R. 115-117). What part of that value was destroyed by the sewer plant can only be determined from the figures

on rental value. Respondent's figures indicated a destruction of one-half of the value (R. 42). Petitioner's evidence indicated no destruction of rental value (R. 116, 117, 138). The court found a destruction of rental value of $100 per year for 100 acres or $1.00 per acre which represents one-quarter of the total rental value since after allowance for this loss of rental value the land still rented for $3.17 per acre (42).

Construction of Sewer Plant Not Defective.

Except for the reference, direct or implied, that it was defective construction for the city to omit to include a secondary disposal plant, there is no finding in the decree or either of the court opinions that the construction was in any manner defective.

ISSUES OF THIS REVIEW.

To sharpen the issues deemed most important upon this review, petitioner for the purpose of such review concedes the point which among other matters it contested below, to-wit, that the sewer system and disposal plant in question do materially increase the contamination of the water course in question and do constitute a nuisance.

Petitioner further concedes that in so far as the decree in question may be directed at any careless or negligent operation of the existing sewer system and disposal plant, petitioner may not be heard to complain thereof. The observation is incidentally dropped, however, that any instances of that kind shown in the evidence are old cases and are no longer occurring. But primarily it must be observed that the decree goes beyond any such matter of negligent operation and contemplates the required erection of a secondary and additional disposal plant.

The issues here urged as of sufficient importance to warrant the attention of this court are those set out in the petition for writ of certiorari and in the brief in support thereof, to-wit:

Matters of General Law.

(With Segregated Citations.)

I.

The nuisance in question is permanent as distinguished from temporary and is not subject to be

abated by court order, (1) because of its fixed, inherent, substantial physical character, and (2) because the damage wrought by it is a mere property damage which was compensable in a money judgment, whereas enforced abandonment of the sewer plant would seriously adversely affect the public welfare.

New York City v. *Pine,* 185 U. S. 93, 22 S. Ct. 592, 46 L. Ed. 820 (1902).

Kent v. *City of Trenton, Missouri,* not officially reported, 48 S. W. 2nd 571, l. c. 575 (1931).

Hayes v. *Railroad,* 177 Mo. App. 201, 162 S. W. 266 (1913).

Smith v. *Sedalia,* 244 Mo. 107, 149 S. W. 597 (1912).

Horine v. *People's Sewer Co.,* 200 Mo. App. 233, 204 S. W. 735 (1918).

Bollinger et al. v. *American Asphalt Roof Corporation,* 224 Mo. App. 98, 19 S. W. 2nd 544 (1929).

Rhodes v. *Durham,* 165 N. C. 679, 81 S. E. 938 (1914).

Bartlett v. *Grasselli Chemical Co.,* 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54 (1922).

Blankenship v. *Kansas Explorations, Inc.,* 325 Mo. 998, 30 S. W. 2nd 471 (1930).

Texas and Pacific R. R. v. *Marshall,* 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385 (1890).

City of Cape Girardeau v. *Hunze,* 314 Mo. 438, 284 S. W. 471 (1926).

Sussex Land and Live Stock Co. v. *Midwest Refining Co.,* (C. C. A. 8th Cir., 1923), 294 Fed. 597, 34 L. R. A. 249.

Corpus Juris on Nuisance, Vol. 46, p. 775, Sec. 385, also p. 804.

Corpus Juris on Injunctions, Vol. 32, p. 81.

Corpus Juris on Municipal Corporations, Vol. 43, p. 956, Sec. 1734.

Among the authorities supra petitioner calls especial attention to that of New York City v. *Pine not cited in the first brief herein.*

II.

The judicial power may not command affirmative legislative action, and when such legislative action is not proceeding voluntarily the court may not take such legislative action into consideration as a factor in determining the issuance of its order enjoining a municipality from the use of its existing public sewer system.

Standard Oil Co. v. *Marysville,* 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856 (C. C. A. 8th Cir.).

Woodson v. *The City of Kansas,* 58 Mo. App. 272, l. c. 278.

Haeussler Investment Co. v. *Bates,* 306 Mo. 392, l. c. 407-412, 267 S. W. 632, l. c. 634-636.

Thurston v. *The City of St. Joseph,* 51 Mo. 510, l. c. 519.

Donahoe v. *Kansas City,* 136 Mo. 657, l. c. 666.

Corpus Juris on Municipal Corporations, Vol. 43, p. 299, Sec. 314, also Vol. 44, p. 154, also Vol. 44, p. 1084, Sec. 4002.

Corpus Juris on Mandamus, Vol. 38, p. 756, Sec. 386.

Corpus Juris on Injunctions, Vol. 32, p. 260, Sec. 410, also p. 250, Sec. 391.

McQuillan on Municipal Corporations, 2nd Ed. Vol. IV, p. 325, Sec. 1562, also Sec. 2871.

III.

Even did the judicial power include such control over legislative action, it might not operate in the present instance because of the state constitutional revenue limitations governing the petitioner which, under the undisputed facts as to petitioner's financial condition, leave it financially unable to comply, whether the resources for compliance be sought

(a) in the City's general revenues, or

Constitution of Missouri, Sec. 11, Article X.

Union Trust Co. v. *Pagenstecher,* 221 Mo. 121, 119 S. W. 1103.

Anderson v. *Ripley Co.,* 181 Mo. 46, 80 S. W. 263, l. c. 267.

(b) in the City's debt-making power, or

Constitution of Missouri, Sec. 12, Article X and Sec. 12-a, Article X.

Comor v. *City of Nevada,* 188 Mo. 148, 86 S. W. 256.

State ex rel. v. *City of Willow Springs,* 183 S. W. 589.

State ex rel. v. *University City,* 320 Mo. 451, 8 S. W. 2d 13.

State ex rel. v. *Hackman,* 287 Mo. 184, 229 S. W. 1078.

(c) in the City's power of special assessment.

See authorities, *supra.*

(d) In the City's power to levy a "special public sewer tax," a method newly differentiated by respondent from the general classification, special assessment.

See authorities, *supra,* also:

Small v. *Partway Auto Supplies, Inc.*

Sacks v. *Legg,* 219 Ill. App. 144, l. c. 147.

Lamar Water and Electric Light Co. v. *City of Lamar,* 128 Mo. 188, 31 S. W. 756.

State ex rel. v. *Town of Columbia,* 111 Mo. 365, 20 S. W. 90.

Brooks v. *Schultz, Tax Collector,* 178 Mo. 222, 77 S. W. 861.

IV.

Beyond all of the considerations above, equity does not approve, at least under the circumstances of this case, an enforced expenditure of possibly $30,000.00 to cure a continuing property damage of $100.00 per year.

New York City v. *Pine,* 185 U. S. 93, 22 S. Ct. 592, 46 L. Ed. 820.

Sussex Land & Live Stock Co. v. *Midwest Refining Co.,* (C. C. A. 8th Cir. 1923) 294 Fed. 597, 34 L. R. A. 249.

Kansas v. *Colorado,* 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956.

McCarthy v. *Bunker Hill and Sullivan Mining Co.,* (C. C. A. 9th Cir. 1908) 164 Fed. 927, 92 C. C. A. 259.

Parker v. *Winnispiseogee Cotton and Woolen Co.,* 67 U. S. 545, 17 L. Ed. 333.

Bliss v. *Washoe Copper Co.,* (C. C. A. 9th Cir. 1911) 186 Fed. 789, 109 C. C. A. 133.

Corpus Juris on Nuisances, Vol. 46, p. 775, Sec. 385.

Matters of Local Law.

Points I and III above are doubly deserving of the attention of this court because they involve matters

of local law with which the ruling herein of the learned Circuit Court of Appeals is in direct conflict. That both Points I and III involve matters of local law is the effect of the following citations.

Swift v. *Tyson,* 16 Peters 1.
Jackson v. *Chew,* 12 Wheat. 153.
Green v. *Lessee of Neal,* 6 Peters 291, l. c. 296.
Des Moines Nat. Bank v. *Fairweather,* 44 S. Ct. 23.
Hancock v. *City of Muskogee,* 39 S. Ct. 528.
Jones v. *Prairie Oil & Gas Co.,* 47 S. Ct. 338, 273 U. S. 195, 71 L. Ed. 602.
Livingston v. *Jefferson,* Fed. Cas. No. 8411.
Smith v. *Stasco Milling Co.,* 18 Fed. 2d 736.
Sullivan v. *American Manufacturing Company of Massachusetts,* (C. C. A. 4th Cir. 1929) 33 F. 2d 690.

From this last citation *a case of nuisance* on account of the fumes and vapors emitted by a factory in South Carolina, petitioner quotes as follows (l. c. 693):

> "We agree with the learned judge below and with counsel for defendant that plaintiff's right to recover must be determined by the law of South Carolina. The right of action is essentially local. See *Livingston* v. *Jefferson,* Fed. Cas. No. 8411. Also it arises out of the ownership and enjoyment of real property. It is governed therefore by the law of the state where the property is situate, *Smith* v. *Stasco Milling Co.,* 18 Fed. 2nd 736."

REBUTTAL.

Right of Sewage Disposal.

As a preliminary matter, and because some inferences of respondent's argument are apparently to the contrary, (Resp. 1st B. 6), let it be said that petitioner makes no claim of a right to dump sewage as it pleases and to leave the property owner thus damaged without any recourse. Petitioner's claim is that the *remedy* was one for original damages that belonged to the original land owner. Respondent acquired the land two years later with full knowledge of the existence of the situation now complained of.

Legal administration in our country follows the historical analogy of the order of the development of English procedure, and, in search of a remedy for a particular legal wrong, first scans the remedies afforded in an action at law, and passes into the realm of equitable remedies only after exhausting the possibility of an adequate remedy in the first classification.

Condemnation.

Respondent serves notice that it will contend that under Sections 7023, 7079 and 7090, R. S. Mo., 1929, petitioner could have acquired a right to use the watercourse in question, as it is using it, by condemnation.

No such suggestion of this kind occurs in the original petition or in any of the proceedings of the trial

court. The point of those proceedings is to *prohibit* petitioner from making use of the watercourse for the discharge of sewage effluent without further purification by a secondary disposal plant; not to *enable* petitioner to make use of such watercourse without that further disproportionate and legally impossible expense. Petitioner, on the contrary, has consistently held to the theory that if any nuisance had been created the same was merely one of property damage and that the original property owner had thereby been possessed of a right of action for damages caused by a permanent nuisance, which for all practical effects got to the same result to be had by the condemnation now pointed to by respondent.

Has not respondent heretofore urged a right in real estate ownership that is so high and inviolate that it transcends even the public service and convenience of the sewer system in question, and can refuse damages and demand instead an abatement of the present discharge? And, is not any present recession by respondent from that position to one of substitution of the claim that petitioner may proceed or might have proceeded to condemn the watercourse in question, a substantial abandonment of the fundamentals of the decree here in question?

Moreover, while we bear in mind that condemnation is merely certain machinery for working out the principle that public requirements override private property rights, subject only to compensation therefor, we may question whether the particular machinery now

brought forward by respondent is adequate under the circumstances here existing to carry into effect such principle.

The first of these condemnation statutes, *supra*, Sec. 7023, deals with steps "for the prevention of the introduction of contagious diseases in the city." There is no evidence that the condemnation of this watercourse will prevent any contagious diseases in the City.

Again, observe that this statute proposes to "condemn and hold for the city * * * all necessary lands for * * * sewer carriage and outfall * * *." Is the City expected to buy by condemnation one hundred acres of pasture land which even now, despite the sewer, rents for $3.17 per acre? Or, is not the City more properly merely liable for such damage, if any, as brought the land value down to the point where it would rent for only $3.17 per acre?

And again, if the City exhausted its bonding power in building the sewer it did build, then was it not, at that time at least, without funds to acquire this one hundred acres of land, and was not the situation at that time crystallized as one in which the property owner at that time might recover from the City original damages for such part of the value of the one hundred acres as was destroyed by the presence of the sewage effluent in the watercourse?

Section 7079, R. S. Mo., 1929, *supra*, authorizes no taking of property outside of the City, and if there be any merit in the doctrine of *ejusdem generis*, has no application to condemning a right to pollute a stream.

Section 7090, R. S. Mo., 1929, *supra,* in no way enlarges the right of the City to condemn, but refers merely to the method of payment for such condemnations as are permitted by the foregoing statutes.

These three sections of the statutes just referred to relating to cities of the fourth class are quite different from the express sewer provisions, Sections 6872-6898, R. S. Mo., 1929 (Sections 8354-8371, R. S. Mo., 1919), referred to in the case of *City of Cape Girardeau* v. *Hunze*, 314 Mo. 438, 284 S. W. 471, in which the Supreme Court of Missouri discusses the right given by such sections of the statute applicable to cities of the *third* class to condemn the use of streams for sewer purposes beyond the corporate limits, and announces a doctrine of riparian rights as affected by municipal sewage disposal which gives liberal consideration to the public interest.

But even if Section 7023, R. S. Mo., 1929, *supra,* authorizes such a condemnation as is contended for by respondent, yet an action for damages, as contended for by petitioner, is the equivalent thereof, a thing recognized in the construction *of this statute* by the appellate courts of Missouri.

Barton v. *City of Odessa,* 109 Mo. App. 76, l. c. 83:

> "The right of cities under the law to quarantine against infectious disease does not include the right to seize private property without compensation; and as said seventh count is for damages sustained by reason of the seizure and use of plaintiff's hotel without compensation, it states a good cause of action."

Respondent's Citations Upon the Subject of Permanent or Temporary Nuisance.

Respondent's citation of *Mining Company* v. *City of Joplin,* 124 Mo. 129, 27 S. W. 406, is subject to the following comment:

The trial court perpetually enjoined the City of Joplin, Missouri, from building a public sewer over the plaintiff's land. The Supreme Court of Missouri set aside this decree and *ordered the plaintiff's petition in equity dismissed.*

Incidentally the court uses this language pertinent to petitioner's Point II:

124 Mo. l. c. 138:

> "But it is for the city council to determine the question whether the public welfare requires or makes the sewer necessary or expedient. With that question the courts have nothing to do, for the law has confided it to the judgment of the city council."

Again the court uses language easily subject to simple paraphrasing to conform to petitioner's claim that under the facts of this case the affected land owner had an action for damages:

124 Mo. l. c. 140:

> "The plaintiff can assert and have all its rights determined in the condemnation proceedings appealed by it to the circuit court. There is therefore no case here calling for equitable interference."

Respondent's citation of *Swanson, et al.*, v. *Bradshaw,* (Missouri Appeals, 1916) 187 S. W. 268 (not officially reported) is the report of an action between two private parties over a continuing practice on the part of the defendant of disposing of garbage and dead animals on his property. It involved no consideration of a permanent, structural nuisance.

Respondent's citation of *Scott* v. *City of Marshall,* 223 Mo. App. 596, 14 S. W. (2d) 694, involved almost wholly questions of the sufficiency of the evidence to support the judgment and decree. The parties did not raise, and the decision did not pass upon, any question of permanent or temporary nuisance or any other question involved in this present review.

Respondent's next citation, *Baltimore & Potomac R. R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739, apart from the issues of this case, is interesting because it involves a nuisance in the City of Washington almost on the doorstep of the court, and deals with a controversy between a railroad company engaged more or less in very essential tasks of operation, and a church congregation. The church complained that the noise and smoke from the engine house adjoining its house of worship had damaged it.

However, the case makes but a humming-bird contact with the issues here. It was a controversy be-

tween private parties and the question was primarily *whether a money judgment for damages* for the maintenance of a nuisance should be sustained, or whether the railroad company, having obtained the authorization of Congress to operate in the City of Washington, was above the ordinary rules of law applicable to nuisance and therefore not required to answer, even in damages, for the nuisance maintained. The pleadings, the evidence, the judgment, and the opinion, all ignored any question of permanent or temporary nuisance. If the case has any weight in decision of the issues here it would seem to be in petitioner's favor, inasmuch as the remedy chosen and sustained was an action at law for damages.

A case not cited by respondent but coming closer to respondent's contentions, and to which petitioner feels constrained to call attention, is that of a subsequent lawsuit between the same parties, *Baltimore & Potomac R. R.* v. *Fifth Baptist Church*, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784. The church, following its victory in the first decision, filed a second suit for damages accruing over a subsequent period, and then filed a third suit for damages accruing over a still further subsequent period. In the third suit the railroad company sought to have the trial court instruct the jury that in determining their award of damages to the church they should "take into consideration" the amounts of the former two judgments in favor of the church, and this, in effect, the court refused to do. This court affirmed that third judgment. And this might seem to be a holding by this court that the rail-

road engine house was regarded as merely a temporary nuisance.

But even in this case the court in concluding its opinion points out that it is not the structure that is complained of, but the wrongful use of the structure. These wrongful uses were recurring acts of the defendant. In our Harrisonville case, however, the structure is susceptible of but one use, the handling of sewage, and is practically self-operating, and of such an inherent character that even under perfect attention by petitioner in the operation thereof it will always run a discharge of the objectionable forty per cent of putrescible matter. In other words, the substance of the nuisance complained of in our case is not recurring, separate acts on the part of the City in the use of the structure, but is the structure itself in the substantially self-operating performance of its single function.

However all this may be, it is certain that in none of these Baltimore & Potomac Railroad cases did the court dip into equity and issue any order of injunction.

Edmondson v. *City of Moberly*, 98 Mo. 523, 11 S. W. 990, next cited by respondent deals merely with a denial of the trial court to the plaintiff of any right of action at law against the City for damages for discharging its sewage into a small stream near plaintiff's land within the city limits. The Supreme Court reversed this ruling and sent this action at law back for trial. No one undertook to plead, or prove or

decide therein that the court should enjoin the use of the sewer plant.

Up to this point in this *seriatum* examination no case cited by respondent has granted an injunction and no case has discussed the difference between a permanent and a temporary nuisance, or made firm contact with any of the issues here for review. Nor does respondent from this point on by way of citation again enter the State of Missouri, except for the citation of *Bollinger* v. *American Asphalt Roof Corporation,* 224 Mo. App. 98, 19 S. W. (2nd) 544. This was an action at law for money damages only. It was between private parties involving no consideration of any benefit by the alleged nuisance to the public welfare. The distinction is well made there between a structure, the factory buildings in question, and the things complained of done in or about that structure. Since the latter was the ground of complaint the nuisance was properly held to be a temporary rather than a permanent one. The case, however, contains an interesting review of the law of Missouri on the subject of permanent or temporary nuisance which seems to justify the following lengthy quotation:

Bollinger, et al., v. *American Asphalt Roof Corporation,* 19 S. W. (2d) 544, l. c. 546, 547:

> "Appellant assigns as error the refusal of the court to give its requested Instruction C, as follows: 'The court instructs the jury that the nuisance complained of, if any, was a permanent one and not a continuing one, and existed with the knowledge of the plaintiff more than five years

before the filing of the action, and therefore your verdict must be in favor of the defendants and against the plaintiff.'

"This action was commenced on September 30, 1926. The evidence shows that appellant's plant was completed and operations begun therein on October 1, 1920; and appellant contends that it has continued to operate in substantially the same manner ever since that date, save for some improvements in method. From this appellant argues that, whatever the damage to plaintiffs' property, it was fully clear and evident from the first day of operations, and that the nuisance then created, if any, was of a permanent nature, and that any right of action therefor was barred by Section 1317, Rev. St. Mo. 1919, prior to the bringing of this action.

"The reported cases make a clear distinction in principle between those in which the erection or construction becomes a nuisance from the manner in which it is used, and those in which the erection is a permanent structure, the natural and evident effect of which from the first is to create a nuisance, though the effects may be gradual. Of the latter sort are the cases cited by appellant of *Smith* v. *Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; *Id.*, 182 Mo. 1, 81 S. W. 165; and *Id.*, 244 Mo. 107, 149 S. W. 597, which involved a city sewer, and *De Geofroy* v. *Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524, which involved an elevated steam railway on a public street, upon which plaintiff's land abutted. In these cases it was held that the right of action accrued at the date of the original construction, and the statute of limitations ran from that date. In the case of *Howard County* v. *C. & A. R. R. Co.*, 130 Mo. 652, 32 S. W. 651, an action for damages to plaintiff's bridge was filed in the year 1893. In holding that the claim was not barred

by the statute of limitations, the Supreme Court said:

"'While the evidence tended to prove that the obstructions thrown into the stream by defendant's servants in 1885, changed the current of the stream, so that in the fall of that year the water began to flow against the pier, it also tended to prove that no actual or material injury was done to the pier until within a period of five years next before the suit was brought; and the court so found, and held that plaintiff's action was not barred. In this, we think, the court committed no error. While there is some conflict between the American cases on this subject, the rule sustained by the great weight of authority seems to be, that when by wrongful acts, a permanent nuisance is created, and the injury therefrom is direct, immediate, and complete, so that the damages can be immediately measured in a single action, the statute will begin to run from the erection of the nuisance. On the other hand, when the injury, as in this case, is not complete, so that the damages can be measured, at the time of the creation of the nuisance in one action, but depends upon its continuance and the uncertain operation of the seasons, or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom.'

"In the case of *Powers* v. *St. Louis, I. M. & S. R. R.*, 158 Mo. 87, 57 S. W. 1090, defendant had constructed a canal whereby the river channel was changed, causing the current to suddenly turn in an acute angle. As a result, plaintiff's land was gradually washed away and flooded. The canal was completed in 1868, and the suit was begun in 1895. The court distinguished the case from the Howard County case, *supra*, and held that the *cause* of the damage was complete and visible in 1868, and held

that no damages were recoverable. In the course of its opinion, the court said:

" 'They practically claim that this is a continuing nuisance, and that the damages are apportionable, and can be sued for separately, until eternity, as often as a further quantum of damage is done. This is untenable. The evidence shows, and common sense demonstrates, that the damage has been and must be gradual, and that it began as soon as the permanent canal was built, and must continue until a bend is formed which will stop the wearing away of the bank. This began in 1868. At that time C. T. Tullock owned the land, * * * until 1882, and all the time (fourteen years) this process of gradual wearing away was going on. He made no complaint. The cause of action to complain and to recover full compensation for all damages, present and prospective, was therefore barred as to Tullock when he sold the land to the plaintiffs in 1882. They took the land in this condition, used it, saw the process of wearing away going on * * * from 1882 to 1895 (thirteen years), and made no complaint, and at the expiration of twenty-seven years from the time the cause of action accrued, and the damages had become apparent and susceptible of computation, they sued the defendant, and recovered nearly half as much as damages as they paid for the whole tract of 537.52 acres of land.

" 'The claim is clearly barred by limitation. The original construction of the canal was unworkmanlike, defective, and negligent, and necessarily produced the results complained of, but the time has long since passed when an action therefor could be maintained. The structure was permanent, the damage apparent and measurable, and could only be recovered in a single action. It is in no proper sense a continuing nuisance, where the damages are apportionable.'

"In the case of *Hayes* v. *St. Louis & S. F. R. R. Co.*, 177 Mo. App. 201, 162 S. W. 266, defendant built a railroad embankment which caused an overflow on plaintiff's land. The opinion reviews the cases on the subject, and says:

" 'It is stated thus in 29 Cyc. 1254: "Where a nuisance is of such a permanent character that a single recovery can be had, including the whole damage, past and future, resulting therefrom, there can be but one recovery; but where the nuisance is of a continuing (abatable) nature, each continuance gives rise to a new cause of action, and successive actions may be maintained for the damages accruing from time to time"; and, again, at page 1260: "Statutes limiting the time within which actions may be brought apply to actions for damages for nuisances, and where the nuisance is of a permanent character the period runs from the time when the injury was done or the structure complained of erected; but where the nuisance is a continuing one an action for injuries from the continuance may be brought after the lapse of more than the statutory period since the creation of the nuisance, although in such case the recovery is limited to damages for the statutory period preceding the commencement of the action." * * *

" 'Then it should be borne in mind that it is the character of the source or cause of the injury as to being permanent or temporary rather than the character of the injury itself that determines to which class it belongs. In 29 Cyc. 1154 these terms are defined thus: "A permanent nuisance is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely, and as a rule consists of some building or structure. Nuisances consisting of acts done, or particular uses of property, may be properly termed continuing when they are of such a character that they may continue indefinitely, or on the other

hand may be discontinued at any time." The permanent injury, a cause of action for which is single, and accrues once for all, may be permanent either from the inherent nature of the injury itself, as going to the destruction of the estate or its beneficial use, or from the nuisance or cause of the injury being permanent. The effect is permanent whether arising from a single act or from a constantly recurring series of acts from the same permanent cause.'

"In the light of these decisions it seems clear that the erection of defendant's plant for manufacturing purposes cannot be said to have been a nuisance *per se*, or such as in itself was notice or evidence that it would be operated and maintained in a way to constitute such a nuisance. There is nothing in the character of the structure which would in any way prevent it from being maintained indefinitely without offense to anyone. The things complained of are due to the manner of its use."

In the case of *City of Oklahoma City* v. *West*, 155 Oklahoma 63, 7 Pac. (2d) 888, cited by respondent, we have a case which it must be conceded is at least partially in point. We reserve the discussion of it until later herein.

Respondent cites two cases from Arkansas, the first of which is *Jones* v. *Sewer Improvement District No. 3*, 119 Ark. 166, 177 S. W. 888. As an introduction to the discussion of this case, we quote the following excerpt therefrom italicizing certain words that contain the key to a special condition of the Arkansas law and the problem confronting Arkansas courts in this class of cases:

177 S. W. l. c. 889:

> "In the case at bar the plaintiffs instituted actions in the circuit court for *the taking and damaging of their property* by the sewer improvement district, and recovered judgment thereon. • • •
>
> "In the circuit court the plaintiffs were allowed to recover damages according to this rule; that is to say, they were entitled to and allowed to recover damages for the land taken and damaged by the construction of the sewer. The damages allowed in such cases are those which result from the proper construction of a sewer."

The court found, however, that after the sewer was constructed it was not maintained and operated so as to avoid a nuisance. And it is this matter of maintenance and operation at which the equity suit involved in this decision is aimed.

The trial court dismissed the bill of complaint for want of equity and the appellate court reversed this ruling, and directed the chancellor below to enjoin that one of the defendants "whichever now have control of the operation and maintenance of the sewer system, from operating and maintaining it so as to create or continue a nuisance on the lands of plaintiffs." This case is subject to the following comment:

It dealt with a septic tank and with chemical treatment incidental to a septic tank operation, that chemical treatment a thing to be carried out by the defendants. The case makes the distinction that the court is looking not at the structure, but at its operation:

177 S. W. l. c. 890:

> "The mere fact that sewers are of permanent construction does not render the nuisance, if any, permanent also. As we have already seen, the nuisance in the present case arose from faulty operation and maintenance of the sewer. It was therefore of a continuing or recurring nature, and the action of plaintiffs was not barred."

Of course in our case the Imhoff tank, as before stated, is practically self-operating; does not contemplate any chemical treatment, and even under perfect operation will reduce the putrescible matter only sixty per cent. This concrete structure is connected with the sewer mains which are constantly receiving sewage deposits, and, it would seem clear, is in itself a structural nuisance.

The attention of the court in this Jones case, however, seems to be concerned but casually with the distinctions between permanent and temporary nuisance and to be absorbed with the problem of whether the City is beyond any attack, either in law or equity, for any improper discharge of its sewage. The discussion on the one hand is one of corporate as distinguished from governmental powers, and on the other hand of the constitutional prohibition against damage to private property for public use without just compensation. The court is struggling apparently between these two legal premises with the peculiar problem imposed upon it by the law of Arkansas, to-wit, that it may not render a money judgment against the City for a tort and that therefore its only

road out for protecting the complainants is in an action in equity. Observe this quotation:

177 S. W. l. c. 891:

> "As we have already seen, this court has uniformly held that neither municipal corporations nor local improvement districts nor their officers may be sued at law for tort; but it does not follow that in a proper case they may not be enjoined from creating a nuisance or be required to abate one already created by them. Indeed, this affords ground for equitable relief in actions like this."

How, says the reader, are we to reconcile this theory of no money judgment for tort with the fact that money judgments of a character have, according to the case, already been rendered against the defendants, and, likewise money judgments in the case of *McLaughlin* v. *City of Hope*, 107 Ark. 442, 155 S. W. 910, cited in this Jones case? The key to the answer is, in the words italicized in the opening quotation from this case. The Arkansas court in the McLaughlin case had worked out the theory that the City, by constitutional requirement was obliged to pay in the way of condemnation for private property taken or damaged for public use; that therefore the court could render the money judgment against the City in a situation where the facts could be squeezed in under a theory of condemnation. In that *McLaughlin Case*, 155 S. W. l. c. 912, in considering somewhat similar facts and sustaining a money judgment the court said:

> "Since the city's action in constructing its sewer system so as to turn the sewage into said branch indicates an intention to acquire a permanent right to continue to so use it and pollute the stream, the damages to the owner should be assessed upon that basis and as though the city were proceeding to acquire it under its power of eminent domain."

Coming back to the Jones case, the court finds that the plaintiffs there have already made a recovery and exhausted their right under this somewhat elastic conception of condemnation; that that theoretical condemnation result, however, contemplated a sewer system properly maintained and operated, whereas the system after construction was apparently not so maintained and operated. But what could the court do under that circumstance? That constituted a tort for which under the Arkansas rule the court could render no money judgment against the defendants, public bodies. Legal remedies therefore being exhausted, the court turns to equity.

The courts of other states, particularly Missouri, suffer no such embarrassment in returning a money judgment against a municipality for the erection of a nuisance, either permanent or temporary, and in fact the present decree includes a money judgment against the City.

Corpus Juris, on Municipal Corporations, Vol. 43, page 956, Section 1734:

> "Where a municipal corporation creates or permits a nuisance by non-feasance or misfeasance,

> it is guilty of tort, and like a private corporation or individual, and to the same extent, is liable for damages in a civil action to any person suffering special injury therefrom, irrespective of the question of negligence; and such liability cannot be avoided on the ground that the municipality is exercising governmental powers."

The text cites a vast number of authorities in support of this proposition, among them two federal authorities, *Seattle* v. *Lloyd's Plate Glass Insurance Co.*, 253 Fed. 321, 165 C. C. A. 103, and *Winona* v. *Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

Respondent's second Arkansas citation, *Sewerage District No. 1* v. *Black*, 141 Arkansas 550, 217 S. W. 813, clears up whatever remaining doubts there may be that the foregoing analysis correctly accounts for these Arkansas decisions. This was another case in which the court, 217 S. W. 814, perpetually enjoined the city, "from so operating, managing and controlling the disposal plant, as to constitute a nuisance to the plaintiffs."

Observe the reasoning upholding equitable relief:

217 S. W. l. c. 817:

> (Our italics) "The complaint stated facts which if true showed that appellants had created and were maintaining a nuisance. The appellees after stating such facts then averred that appellants, *without exercising the right of eminent domain, were taking and damaging the property of the appellees without due process of law.*

"It might be stated in passing that it was developed in the proof at the hearing that one of the appellees *had sought to recover against appellants damages in an action at law which appellants successfully resisted.*

"The complaint further alleged that the acts complained of as constituting the nuisance were continuous and recurring and appellees had no complete and adequate remedy at law. * * *

"It is well settled that under our constitution (Article 2, Section 22) private property cannot be taken, appropriated, or damaged for public use without just compensation therefor (Arkansas citations).

"If the appellants were contending that the exigencies of the public health of the City of Siloam Springs required that they appropriate appellees' property to the use of the public for sewerage purposes under the authority of Section 5664 of Kirby's Digest, and that in the use of such property by appellants for such purposes the appellees would necessarily be damaged, then appellants would be correct in their contention. Because, if that were the case, appellants would have a complete and adequate remedy at law (more Arkansas citations). But such is not this case."

The rule in Arkansas therefore is that a money judgment may not be rendered against a city in an action at law upon a finding that the city has committed or is committing a tort, including nuisance, and that the property owner's only avenue of recovery against the city in an action at law is upon the theory that the city in effect has acquired or damaged the property in question by a condemnation. Where, however, the plaintiff is blocked in such an action by cir-

cumstances inconsistent with the theory of condemnation, then the procedure of Arkansas turns to equity.

Thus the rigidity of the rule of Arkansas preventing any action at law in tort against a city has forced a compensation therefor in a liberalization of the acceptance of what constitutes a temporary or recurring nuisance and justifies equitable interference.

Morse v. *City of Worcester,* 139 Mass. 389, 2 N. E. 694, cited by respondent, provides very little guidance on any question in the case at bar for the reason that the appellate court merely passes upon a demurrer to the plaintiff's petition which was framed in the most general terms and all of the allegations of which the court points out, must for the purposes of its ruling, be accepted as true. The plaintiff there complained of the discharge by the city of sewage into a stream upon which plaintiff owned a mill site, and recited that the city "carelessly, negligently and unnecessarily so constructed said sewers and drains, and carelessly, negligently and unnecessarily so discharged the waters therefrom, and so negligently omitted to take reasonable and proper precautions and methods in the construction of said sewers and drains, and purification of said waters," that the objectionable condition was created. The plaintiff's petition was a bill in equity to abate a nuisance, and on the mere issue of the sufficiency of the petition, was upheld. The petition was one directed more against negligence than anything else, and even in so far as it touched the subject of nuisance, no one

in the case seems to have raised the point about the difference between a permanent and a temporary nuisance, or any of the other points in issue here.

2 N. E., l. c. 296:

> "The bill alleges negligence in constructing the sewer and in failing to use reasonable precautions to purify the sewage. We cannot anticipate what negligence may be proved. Negligence, in this as in most other cases, is largely a question of degree. If the plaintiff shows, that in constructing the sewer, or in adopting the brook to its use as a sewer, the defendant did the work in an improper manner, this bill can be maintained. * * * But to prevent misunderstanding we add that if the only mode of preventing pollution of the river is found to be by the adoption of an extensive system of purification, independent of the construction of the sewer, requiring the taking of large tracts of land, we must not be understood as implying that it is within the duty or the power of the defendant to do this."

Respondent's next citation is *Chapman* v. *City of Rochester,* 110 N. Y. 273, 18 N. E. 88. The court enjoined the city from continuing a nuisance of the following character: The plaintiff owned four acres of land watered by a stream of pure water which he had collected into an artificial basin to use for domestic purposes as well as the propagation of fish and for an ice supply. The city thereafter constructed sewers discharging into the watercourse in question and polluting the same, causing injury to the plaintiff's health as well as his property. Not only did this case

involve injury to health, but apparently nobody raised in this case any question about the difference between a permanent and a temporary nuisance, or any other question involved upon this review.

Respondent's next citation is another Arkansas case, although a decision of the federal court for that district, *Carmichael* v. *City of Texarkana*, 94 Fed. 561. This is a suit in equity against the City and others for the abatement of a nuisance alleged to have been created by the discharge of sewage from the sewer system of the city onto premises of complainants, and to recover damages caused to complainants thereby. Complainant lived in the State of Texas on the Arkansas line on a homestead of some forty-five acres. A brook crossed said land for a distance of 200 yards fed by springs of pure water and was the water supply of complainant and his family and his herd of dairy cattle.

The City of Texarkana later constructed a sewer system discharging its sewage into the creek in question just above complainant's property on the Arkansas side of the state line. The co-defendant water company furnished the water for this sewer and the individual co-defendants maintained sewer connections with it. This sewer greatly damaged complainant's real estate and interfered with the health and enjoyment of himself and family in the use of the property. The case passes merely upon a demurrer attacking the sufficiency of the petition. The court dismissed the action

as to the co-defendant water company and individual co-defendants. Even as to the defendant city, the court makes this ruling:

(l. c. 575:)

> "The demurrer is sustained on the ground that the plaintiffs in this suit can only recover against the city such damage as they show they have sustained up to the time the decree is rendered, and not for prospective damages, for the reason that if an injunction is granted, it cannot be assumed it will be violated, and that other damages will be sustained; and for the reason, if a restraining order is finally refused, then the bill should be dismissed for want of jurisdiction in the court, and the plaintiffs remitted to a court of law for such damages as they may have sustained. In short the jurisdiction of the court in this case rests upon the fact that the plaintiffs are suffering from a continuing nuisance created by the city."

Except for such inferences as may be drawn from the foregoing quotation the court apparently has not canvassed the question of permanent or temporary nuisance and that question seems not to have been raised, altho the court considers at length the matter of riparian rights. This is all doubtless due to the fact that the suit was filed in Arkansas and that the counsel and doubtless the court held the conception of the law on such subjects which we have heretofore in the discussion of two cases of the Supreme Court of Arkansas noted as peculiar to that state.

Respondent's next citation passes over into Oklahoma, *City of Tecumseh* v. *Deister,* 112 Okla. 3, 239 Pac. 582. This was a simple suit at law for damages for discharging sewage into a stream flowing over plaintiff's land. Plaintiff sued for $5,000.00 damages and secured a *verdict for $500.00* which the Supreme Court of Oklahoma sustained. The case passes on none of the issues here for review.

Likewise, respondent's citation, *Harbison* v. *City of Hillsboro,* 103 Ore. 257, 204 Pac. 613, misses contact with any of the issues in review here. The case was one of *a money judgment at law* against the city for the maintenance of a sewer nuisance.

In respondent's citation of *Missouri* v. *Illinois and The Sanitary District of Chicago,* 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 493 (1901) we have a case in which the petition to enjoin the City of Chicago from dumping its sewage into the Mississippi River by an artificial canal was held sufficient upon demurrer. The allegations were those of great injury that would be done the health of thousands of people in Missouri. That is the basis of the court's ruling upon the sufficiency of the allegations of the petition (180 U. S. l. c. 241). It is a far cry from such a case to one in which the injury is a mere property damage and at that only $100 per year.

Another of respondent's citations, *Attorney General ex rel.* v. *City of Grand Rapids*, 175 Mich. 503, 141 N. W. 890, is one in which the general public welfare was arrayed upon the side of the complainant. This was an action instituted against the maintenance of a *public* nuisance proven to be destructive of the health of whole communities.

City of Oklahoma City, Oklahoma, v. *W. C. West,* 155 Okla. 63, 7 Pac. (2d) 888. This citation is respondent's main reliance. The statements of the court in this case are in point in respondent's favor, but petitioner believes that a close scrutiny of the case will reduce very substantially its weight as a precedent for decision of the issues here.

First, be it observed, the action is *one at law for damages* and not one in equity for an order of injunction. We quote the following:

7 Pac. (2d) l. c. 889 (our italics):

> "The nuisance complained of was the turning of unpurified sewage into the river at Oklahoma City to the damage of plaintiff as a riparian owner, and the petition contained the usual allegation that the nuisance *could be abated by the expenditure of money,* and it was alleged that the damage would continue until abatement. The petition contained an admission that a prior action had been settled by a stipulation which allowed a certain sum as damages sustained from the nuisance up to April 15, 1928; judgment for that sum having been rendered pursuant to the stipulation.

It was also alleged that the settlement had been made on the promise of the city to abate the nuisance by purification of the sewage, and alleged that a purification plant erected by the city failed to purify the sewage and that the nuisance still continued to the plaintiff's damage. The answer was a general denial and a plea of the statute of limitations.

"*The plea of the statute of limitations was presented upon the theory that the nuisance was permanent, and the contention that the nuisance was permanent was grounded on an alleged failure to charge any negligence in the adoption or execution of the plan for the construction of the sewers or the disposal plant that had been built.* In addition, it was urged at the trial, that, since the nuisance was permanent, the former recovery, although the action was on the theory of a temporary nuisance, was a bar to recovery in the present action. Unless the nuisance should be held to be permanent, neither contention, that of the statute of limitations nor of the bar of the former action, is sound." • • •

(l. c. 890:)

"We have repeatedly held such a nuisance to be temporary under the rule that, *where a nuisance can be abated by the expenditure of money or labor it shall be considered temporary.* • • •"

Petitioner challenges this expenditure of money or labor test of a temporary nuisance. There probably is no structure including the Pyramids that cannot be removed, given sufficient money and time.

And the court launches into a discussion of the old contention that since the City was authorized to construct this sewer it has committed no nuisance, and

of course the court demonstrates the unsoundness of that contention. Thereafter follows this language:

(l. c. 891):

> "But in the present case what is being done is something that was not authorized, and a right to damages does not require the sanction of a constitutional provision. (Prohibition against the taking of private property for public purpose without just compensation.) The damages are recoverable for what was and what still is a common law tort, a nuisance. We point this out because, if it should be conceded that the right to damages should be based upon the constitutional sanction, it would involve the admission that the nuisance was authorized, *and, if what was a nuisance should be authorized, of course it would be held to be permanent.* It will be found, however, that the real ground of liability in the case is that the nuisance was unauthorized *and the reason why it was unauthorized is a sufficient reason why it should not be considered permanent, a lack of necessity for its commission.*"

Here, it seems to us, is the error of the court's reasoning. True, possibly, if a nuisance is held to be authorized it might by that fact become fixed in character as permanent. It is not logically necessary, however, in denying that the nuisance was authorized, to pass to the conclusion that necessarily it is temporary in character. Following the court's own reasoning on this subject of authorization, the absence of authorization merely leaves the character of the nuisance no longer definitely established as permanent, but leaves the character of the nuisance yet to be ascertained. There are still factors to be considered in arriving at

the decision of its character as permanent or temporary, to-wit, whether the nuisance is a structural nuisance, fixed and permanent, and also whether its continuance will work only slight harm that can be fully compensated for in money, whereas its abatement would work a public hardship.

Elsewhere in this opinion it is true the court disposes of the first matter to its own satisfaction upon the theory that it is not the structure which works the damage, but the use of the structure, and therefore the fixed and substantial character of the structure has nothing to do with determining whether the nuisance in question is a permanent nuisance. We cannot follow the court in that view of a structural nuisance. If it is a sewer plant with connections into the houses and stores of an inhabited community and is practically self-operating, as in the case at bar, we think it entirely fair to say that the structure itself, including of course its normal operation, is the nuisance.

But however that may be, the court in this Oklahoma case apparently gives not a moment's consideration to the question of public welfare or of financial ability on the part of the City to so modify its system as to be unobjectionable. Possibly the court upon the facts in that case is correct in its statement (l. c. 893), "it is *easily* abatable." If so, then upon that ground alone is there an absolute differentiation between the Oklahoma case and that at bar, destroying all value in the Oklahoma case as a precedent here.

Along this same line, note this excerpt:

(l. c. 891:)

> "The authority for the commission of the nuisance, irrespective of the adoption of a plan by the municipality, must be grounded in a permission to commit the nuisance found in the act, or in an *inability* to do the act without committing the nuisance."

In our case, the City is authorized to construct a sewer system but it suffered under the "inability" to do so in the manner demanded by respondent. Apparently it did everything it should have done except to build an additional and secondary disposal plant, a thing it could not do because in constructing the sewer system and plant that it did construct, it thereby exhausted its bonding power and financial resources for that purpose (R. 74, 83). For Harrisonville it was a case of inability, and a case where the nuisance is not "easily abatable." That is, not easily abatable if any consideration is to be given to financial resources, and no good reason appears why financial resources should be ignored.

The court frequently throughout this opinion becomes engrossed with the old question referred to in so many of the old cases with reference to whether constitutional or statutory authority to do or erect the thing that constitutes the nuisance puts the City beyond the ordinary operation of the law of nuisance. For instance, the court says:

(l. c. 892):

> "If the legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if they authorized an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is *no defense.*"

Petitioner complains of this consideration of the subject upon the ground that the thing here for decision is not whether the City has a defense or not, but what is the nature of the plaintiff's remedy. It is most interesting to note that the remedy pursued by the plaintiff in this Oklahoma case was an action at law for damages.

This petitioner is not interested in whether some fine theoretical defense could be made to this charge of nuisance upon the mere ground that petitioner was authorized by law to construct a sewer and that if respondent was injured thereby it was simply the latter's misfortune. We have admitted throughout this case that if the structure in question constituted a nuisance the City was liable to the property owner originally damaged in full property damages; and we are going further, for the purposes of this review, and admitting that the structure is a nuisance. We are advancing here considerations with reference to the remedy, considerations which appear not to have been raised or considered by the Oklahoma court in its discussion of temporary and permanent nuisance.

Even this Oklahoma decision is in conflict with three previous holdings of its own, to-wit:

Mangum v. *Sun Set Field,* 73 Okla. 11, 174 Pac. 501;

Page v. *Oklahoma City,* 129 Okla. 28, 263 Pac. 448; and

City of Ardmore v. *Colbert,* 52 Okla. 235, 152 Pac. 603.

This previous decision of the Supreme Court of Oklahoma, Mangum vs. Sunset Field, favorable to petitioners here, occupies practically one full page of Corpus Juris on Limitations, Vol. 37, p. 889, where as a note the opinion is quoted from in full. That it has been overruled by respondent's citation of City of Oklahoma City vs. West, supports petitioner's contention that the law on this subject which affects such large numbers of people is in an unsettled state and that the situation warrants an expression from this court.

Respondent makes the point in its supplemental brief that the Missouri five year statute of limitations has run on any claim based upon permanent nuisance. The sewer system was constructed in 1923. Respondent with complete knowledge of the situation acquired the property in 1925. The claim for damages for permanent nuisance belonged to the original owner. Respondent never did own that claim. On August 31, 1928, (R. 2) more than five years after the beginning of the sewer system early in 1923 (R. 74) respondent filed this action on the theory of a temporary nuisance. Even had the right of action for damages caused by a

permanent nuisance belonged to respondent, the latter's neglect to file suit thereon within the statutory period is no justification for an action in equity on the theory of temporary nuisance.

For affirmative material on this question of temporary or permanent nuisance, we refer to our former brief, pages 25 to 29, inclusive, and pages 38 to 41, inclusive and to *New York City* v. *Pine,* 185 U. S. 93, 22 S. Ct. 592, 46 L. Ed. 820, and to *Sussex Land and Live Stock Co.* v. *Midwest Refining Co.,* (C. C. A. 8th Cir., 1923) 294 Fed. 597, 34 L. R. A. 249. For further affirmative material petitioner refers to the voluminous notes and citations accompanying the following text from Corpus Juris on Nuisances, Vol. 46, p. 775, §385:

> "In determining the propriety of equitable relief against nuisance, the court will consider, in the exercise of its discretion, the equities presented in the particular case in which its interference is asked, and the injuries which may result to the public by granting the injunction as well as the injuries to be sustained by complainant if it be refused. So an injunction will not ordinarily be granted where the erection complained of has a tendency to promote the public convenience to an extent outweighing the private inconvenience resulting therefrom; where it is necessary to the community generally; or where an injunction would cause serious injury to an individual or the community at large, and a relatively slight benefit to the party seeking such relief; but under such circumstances the person complaining will be left to his remedy at law or merely awarded damages. If the injunction would have the effect of greatly injuring or inconveniencing the public it may be re-

fused, even though, as against defendant, complainant will be entitled to it."

Judicial Interference With Legislative Functions.

Respondent's original brief herein cites no authorities on this matter and confines itself to a short comment upon the facts. Respondent's first contention on this point is apparently that the decree does not require, as claimed by petitioner, the erection of an additional disposal plant. Respondent says, (Resp. B. page 12):

> "The expert engineer testifying for plaintiff below named sand filters, trickling filters, or activated sludge as possible types of treatment which would eliminate the nuisance in question" (R. 50-51).

The inference of this statement is apparently that these types of treatment shown in the proof as those that would eliminate the nuisance in question do not call for a secondary plant. Such inference, however, is directly contrary to the facts. Sand filters, trickling filters and activated sludge are merely three different types of a secondary refining plant. Respondent's own engineer testifying on that point said, (R. 51, bottom of page):

> "Effluent from any of the plants that I have mentioned, that is, activated sludges, sand filters and trickling filters, could be such that it could be discharged into Town Creek without the creation of a nuisance or any condition unfitting the creek for stock water. The outflow from the plant would be relatively clean and without offensive odors.

> This activated sludge plant, or sand filters, or trickling filters, is what is known as a secondary, or final type of plant, and this present Imhoff tank, with some changes in the system of baffling can be used in connection with such a secondary plant. The cost of adding such a secondary system would be $25,000.00 to $30,000.00."

The testimony of petitioner's engineer (R. 95) is in harmony with that above quoted.

Respondent refers to the recommendation of the state health engineer (R. 63 and 64). We quote the following from those pages of the record:

> "The Harrisonville plant is in an Imhoff tank with a sludge dry-bed known usually as primary treatment. This is simply a settling out process of certain solids in the sewage which is usually followed, if necessary, by a secondary treatment where a further stabilization of sewage takes place. An Imhoff tank only settles out a certain per cent of putrescible matter in the sewage and the effluent therefrom will always contain organic matter which is not entirely stabilized, and if in sufficient quantity will pollute a water course. • • • We recommended additional treatment in a report, I think in 1925, to the City of Harrisonville."

Respondent next advances the claim that the decree does not require the City to build an additional disposal plant. Says the respondent,

> "Any number of methods are available to the City to comply with that injunction; it may pipe its sewage elsewhere, or utilize any of the several successful methods in common use for so reducing the sewage that the outflow will be non-putrescent. It may even abandon the sewer system and return

to the method of private disposal by each householder if it feels that it must choose between that and maintaining *unnecessarily* a system which dumps the entire sewage accumulation of the City upon the private property of the respondent."

First as to the suggestion of piping this sewage elsewhere. Can it be piped to the next largest stream in that vicinity grandiloquently called "Grand River"? This stream respondent's own witness, somewhat incidentally, remarks is two miles distant (R. 55). And respondent's failure to develop in the proof any suggestion that this small town pipe its sewage that distance indicates that respondent entertains no serious thought of this method of sewage disposal. But where else? One thing is certain, sewage runs down hill; and another thing is certain, sewage once collected must be discharged some place. Town Creek, which rises within the city limits of Harrisonville and winds through the town, is the natural course of drainage of that territory (R. 73, 94). Petitioner has carried this sewage approximately a quarter of a mile beyond the city limits and has refined it to the extent of 60% and, in a place distant from any human habitation, has discharged the effluent at the low point of drainage in a piece of wooded pasture land, bearing no improvements but the fences.

But it is scarcely candid for respondent to suggest that the injunction in question does not contemplate petitioner's erection of a secondary disposal plant. That is what respondent referred to in its trial court petition wherein it complained that the Imhoff tank

was merely a primary disposal plant and that "by reason of the failure and refusal of the City to construct, maintain and operate proper and adequate disposal facilities for its sewage, a nuisance is created" (R. 8, paragraph 13); and it is what it had in mind in its prayer when it prayed, "that the defendant City of Harrisonville be given a reasonable time to construct and place in operation a sufficient and adequate sewage disposal plant" (R. 10); and this secondary plant is the only method offered by respondent in its proof as a practical method of relief. Note the testimony of respondent's engineer, *supra.*

And the trial court in its decree interpreted in the light of its opinion and the pleadings and the evidence has in mind a secondary plant:

> "3. The court finds that it is unnecessary for the defendant City of Harrisonville to discharge raw or partially treated sewage into the said watercourse upon plaintiff's land, and that the defendant City may by use of reasonable means available to said defendant City abate the said nuisance, and that six months' time from the date of this decree is a reasonable time within which the said City may abate said nuisance" (R. 15).

The court could only make that finding from the evidence, and the evidence referred only to a secondary plant.

The decree further says:

> "Provided, however, and it is further ordered, adjudged and decreed, that the said defendant be and it is hereby given a period of six months

from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods as the said defendant City may select to prevent, cease and determine the discharge of putrescible sewage matter in the said watercourse in, on or above said plaintiff's land" (R. 16).

The trial court's opinion reads:

"The evidence shows that the City in an effort to dispose of its sewage constructed an Imhoff tank. Admittedly this structure can only dispose of approximately 60% of the raw sewage turned into it. Concededly 40% was carried without treatment and discharged into Town Creek. It further appears that said Imhoff tank was not efficiently operated so that the maximum benefits could be realized. The court finds from the evidence that the sewage after passing through the Imhoff tank, as a primary disposal plant, *could without great expense be further treated in a secondary plant, and that by such treatment* the sewage of the city could be reduced or disposed of to a maximum of 90%. This would reduce the sewage for practical purposes and would have the effect to abate the nuisance" (R. 180, our italics).

The Circuit Court of Appeals took the same view in its opinion which we quote as follows:

"By the installation of a supplementary tank the sewage disposal system of said defendant may be so improved that the effluent therefrom would be comparatively harmless and inoffensive (R. 186). • • •

"In this case, however, with the installation of a supplementary tank the condition of the creek will tend to correct itself" (R. 190).

Respondent's next suggestion that if the petitioner does not want to build, or is unable to build a secondary disposal plant, "it may even abandon the sewer system and return to the method of private disposal by each householder," is so abhorrent to one's sense of the requirements of community life that it scarcely requires further comment. Because respondent, the owner of this pastureland, suffers a damage at the rate of $100.00 a year for which the City can easily reimburse it, respondent demands that, if necessary to prevent that $100.00 damage, a community of two thousand people abandon a sanitary system which the evidence discloses is absolutely essential (R. 96, 72, 73).

And all the while, under the law of Missouri, there was the protection accorded the original owner of the land of the right to a money judgment for his total damages past and contemplated. And plaintiff acquired its property two years after the nuisance had been in operation and that original damage done and with full knowledge of the situation (R. 42).

Respondent has done little to refute the petitioner's point that the erection of a secondary disposal plant particularly in the council proceedings authorizing it and making financial provision for it, involve the exercise of legislative powers and that such powers are beyond the affirmative direction of the judiciary.

Financial Powers of the City.

Respondent's original brief makes the statement that in such a case as this the financial powers of the

City are not a matter of concern to the court, and in support of that statement points to the cases previously cited in connection with the matter of nuisance. It is true that in several of those cases the court issued an order of injunction against the City and in some of those under circumstances which might imply the expenditure of further money by the City, but in not one of those cases was the point raised or considered that the City would experience any financial difficulty in compliance with the order of injunction.

In respondent's supplemental brief we find respondent listing four separate methods by which it claims the City could raise the necessary funds to comply with this order which may require an expenditure of as much as $30,000.00. They are:

(a) Bonding power;

(b) Special public sewer tax;

(c) Special assessments;

(d) General revenue.

(a) Bonding Power: Petitioner is unable to see that respondent has advanced the course of the argument in any degree under this heading. That the evidence discloses that the City has outstanding against its bonding power the sum of $42,500, testified to by the witness in that portion of the record quoted by respondent to be $42,500.00 is exactly in accordance with petitioner's original statement and contention herein (P. 9), that being the difference between the bonding power authorized, $55,-

083.00, and the bonding power remaining, to-wit, $12,583.00.

Petitioner's statement to the trial court about its legal power to make a levy beyond the constitutional limitations for the purpose of paying a judgment against it entered upon an action *ex delicto* is, despite respondent's reference at this point to it as inconsistent, in strict accordance with the law. *Connor* v. *City of Nevada*, 188 Mo. 148, 86 S. W. 256 (1905); *State ex rel. Poole* v. *City of Willow Springs*, (Missouri Court of Appeals, 1916, not officially reported), 183 S. W. 589; *State ex rel. Pyle* v. *University City*, 320 Mo. 451, 8 S. W. 2nd 73.

(b) Special Public Sewer Tax: Respondent quotes Section 7031, R. S. Mo. 1929, originally quoted in petitioner's petition (P. 11) which provides that "public sewers shall be established *along the principal courses of drainage*, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, etc." A glance at the map of Harrisonville, Defendant's Exhibit B, page 1, record 160, shows that that is exactly what was done in the present instance. Respondent recurs to this section of the Missouri statutes because it includes an authorization for levying a "special public sewer tax," "on all property made taxable for state purposes over the whole City."

This is the section under review in the case of *Union Trust Co.* v. *Pagenstecher, Tax Collector*, 221 Mo. 121, 119 S. W. 1103, heretofore cited by petitioner

(P. 12, 31, 35, 52 and 53), and the fact remains that under such decision of the Missouri Supreme Court the section of the statutes referred to is limited in its application by Section 11, Article X, of the Constitution of Missouri, which provides that the City is limited to a tax levy of fifty cents on the $100.00 valuation, with an exception to which we will refer in just a moment.

First, since from this supplemental brief of respondent some doubt is cast upon the following matter of fact, let it be noted that the evidence shows (R. 101, 102, 112 and 113) that the City's annual revenue, with no deductions for uncollectible items (which are considerable), is $6,120.59, all of which is required for the City's ordinary current expenses.

Respondent endeavors to construe the Union Trust Company case as one limited to the simple proposition that the defect in the proceedings therein was the failure to submit the proposition for the tax to a vote of the people. Even if that be true (and we desire shortly to point out some serious question with reference to that view), we face the barriers of these observations.

(1) The court in the case at bar, by its decree, does not say that the *officers* of the City shall submit such a proposition to a vote.

(2) Nor does it say that, if, in the event of such an election, the proposition fails of the requisite two-thirds vote, the decree will not be enforced.

The requirement is addressed to the City, not to individual officers, and it runs into these manifest constitutional obstacles of the invasion by the court of the City's power of legislation; (a) in that the city council would resolve that such a proposition should be submitted and (b) that the people would exercise their legislative privilege to say, "No."

Surely it is impossible to conceive of the court making a valid requirement of the City and at the same time recognize that the requirement was one subject to popular approval by two-thirds vote. Are we to assume that the decree contemplates that the city council shall undertake the legislative requirement of submitting the proposition to the voters, and that the election shall be held, and that when an adverse result of the vote is ascertained there no longer remains any life in the decree, and that it was never contemplated by the court that there should? Decrees of courts are not issued upon the contingency of their being set aside by popular vote.

But even if the decree is to be upheld on such a theory there still remains this query: Do we understand respondent to say that the people shall subject themselves to a tax four or five times the normal revenue tax in order to pay for this improvement? If respondent replies that it expects to pay only a small part each year of the total cost of the improvement, and that therefore there is no necessity for raising in any one year revenue of $36,000.00 ($6,000 general revenue and $30,000 cost of new sewer plant), we come face

to face with the fact that we have shifted over into deferred payments, and must take recognition of Section 12 of Article X of the State Constitution under which, as we have seen above, the City's additional debt-making power is limited in round figures to $12,000.00, an amount wholly insufficient.

We stated above that there was an exception to the tax that might be levied under Section 11. It is of course under that exception that respondent seeks to exercise the power of this statute with reference to a special public sewer tax. The exception to the general revenue constitutional limitation to which it refers is the language which reads:

> "For the purpose of erecting public buildings in counties, cities, or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people and two-thirds of the qualified voters of such county, city or school district voting at such election, shall vote therefor."

Respondent jumps to the conclusion that the phrase "public buildings" includes a secondary sewage disposal plant. These sewage disposal plants are simply open-air filtering processes, or spraying processes sunk in the ground. They are not carried on in buildings or edifices, and could not be included under the term "public buildings" which doubtless refers to such improvements, as a city hall or jail or fire station house or hospital, etc. Perhaps respondent is heard to say that we can, however, thus interpret the term upon

the very authority of this Union Trust Company case, in view of the fact that the court therein takes special note of the fact that the constitutional provision recites that "for the purposes of erecting public buildings in * * * cities, * * *, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to vote of the people, and two-thirds of the qualified voters of such * * * city * * * voting at such election shall vote therefor"; and calls attention to the fact that the city in that case submitted no such proposition for a vote, and of course received no such two-thirds approval. Even so, that is not equivalent to saying that such a sewer is recognized as included in the constitutional term, "public buildings." After the court's construction of the statute and its determination that the tax in question was really a general tax, no matter what it was called, and that therefore the statute was governed by this Section 11, Article X of the State Constitution, there remained only to the city in that case, for whatever it might be worth (and petitioner contends that it was worth nothing), the chance to claim the right to come in under the "public buildings" clause of this section of the constitution. It was a simple matter for the court to cut the City's head off on any claim of that kind by simply pointing out that the City had taken no action for the two-thirds vote. That is not equivalent to saying that had the City taken such action it would be conceded by the court as valid under the constitutional

section on the theory that a sewage disposal plant comes under the description, "public buildings."

Such a plant does not come within the terms of such description. Respondent's authority of *Battle* v. *Wilcox,* 128 S. C. 500, 122 S. E. 516, certainly makes no such holding. The thing there held to be a public building was a hospital. The Supreme Court of Massachusetts in the case of *Small* v. *Partway Auto Supplies, Inc.,* (154 N. E. 521), holds that a building means a structure with walls and usually covered by a roof. To the same effect is the decision in *Sacks* v. *Legg,* 219 Ill. App. 144, l. c. 147, in which the court held that a building is a fabric or edifice such as a house, church, or the like, designated for the habitation of man or animals or for the shelter of property.

See also:

Howell v. *Boston Academy of Notre Dame,* 130 Mass. 209.

Van Baman et al. v. *Gallagher,* 182 Pa. 277, 37 Atl. 832.

Concord v. *Morgan,* 74 N. H. 32, 64 Atl. 725.

In our own state, in the discussion of this very section we have strong ground for saying that the term, "public buildings" does not include some part of a sewer system. The Supreme Court of Missouri in *Lamar Water & Electric Light Co.* v. *City of Lamar,* 128 Mo. 188, 31 S. W. 756, reversed its own decision in the case of *State ex rel.* v. *Town of Columbia,* 111 Mo. 365, 20 S. W. 90, but in both opinions it is taken for granted that the term "public buildings" has a

special or limited meaning which, is not synonymous with public improvements generally. In these cases the court had up the proposition as to whether or not the city could incur indebtedness for a waterworks, etc., even by a two-thirds vote. In the first case the court held that it could not do so where the amount necessary to retire the indebtedness authorized under Section 12, Article X of the State Constitution, would require a tax levy in excess of the general provision of fifty cents on the $100.00 valuation. And in the second case the court holds that that is error, and that this indebtedness authorized under Section 12 is in addition to the rate authorized for general revenue levy under Section 11. Concerning the question of public buildings, both cases draw attention to the fact that Section 11 makes an exception for public buildings, but that payment for a waterworks could not come under that phrase. In the first case the court said, l. c. S. W. 93:

> "When a county, city or town has levied the highest rate allowed by Section 11, it can levy no further or additional tax, except that in counties, cities, and school districts the rates may be increased with the prescribed vote for the purpose of erecting public buildings, as to which no maximum annual rate is fixed, by Section 11. * * * These exceptions as to annual rates do not apply to towns, unless we construe the words, 'for the purpose of erecting public buildings in counties, cities and school districts' as including towns; and if we do give them that construction, still the words 'public buildings' do not include waterworks."

In the second case which overrules the first, the same assumption is made that the term "public buildings" does not include general improvements. In pointing out what the court in the second case believes to be the impracticability of the application of its first opinion, it says, among other things:

(l. c. S. W. 758):

> "That construction of the organic law (the construction of the first case limiting indebtedness under Section 12 to such as could be retired within the tax levy limits of Section 11) would practically eliminate the grant of power to incur an indebtedness, except for public buildings, under the provisions of Section 12."

It does not seem to occur to the court to designate a water plant or light plant as covered by the term "public buildings." The Supreme Court of Missouri apparently holds that the descriptive terms of these constitutional provisions are to be strictly construed, according to *Brooks* v. *Schultz, Tax Collector,* 178 Mo. 222, 77 S. W. 861 (1903) which holds in the closing words of the opinion that although "a public library is an educational institution" it cannot be included under the constitutional term "school purposes."

But what of respondent's claim that petitioner errs in stating that this case of *Union Trust Co.* v. *Pagenstecher, Tax Collector, supra,* holds the statute in question, Section 7031, R. S. Mo., 1929, providing for a "special public sewer tax" to be unconstitutional? Petitioner maintains that *in so far as that statute*

undertakes to provide for a tax in excess of the constitutional levy of 50 cents on the $100 valuation, it is unconstitutional even as to structures that, unlike a sewer, may be included under the constitutional exceptional term "public buildings." The statutory authorization is this: "The *board of aldermen* may levy a tax * * * which tax shall be called 'special public sewer tax,' etc." The statute does not say that the board of aldermen may submit to the people a proposition for a certain tax, etc. That is taxation machinery unprovided.

Petitioner has qualified its statement that the statute is unconstitutional by the phrase "in so far as the statute undertakes to provide for a tax in excess of the constitutional levy of 50 cents on the $100 valuation." Indeed it would seem the better view that the statute contemplates no tax in excess of 50 cents on the $100 valuation and that such statutory purity of intention accounts for putting the tax levy authorization in the board of aldermen. Within the limitation of 50 cents on the $100 valuation they had constitutional power to make a levy without taking any vote of the people. The occasion for the statute was not the attempt to provide a tax in excess of 50 cents on the $100 valuation, but merely the undertaking within that amount to provide for a segregation of a certain part of the total tax levy to a specific improvement: "and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repair of said sewer."

Clearly this Section 7031, R. S. Mo., 1929, with its "special public sewer tax" which it seems most probable herein is what the courts below both had in mind as the revenue source for constructing a secondary sewage disposal plant, provides no such possibility. This is true whether the tax provided for in the statute be regarded as a special tax or as a general tax.

(c) Special Assessments: Respondent proposes as this third method that the City create a district sewer system or possibly follow that up with a joint district sewer system, and then by an assessment method pay for the construction of the additional plant.

Respondent rides rough shod over the fact, first, that such action would be legislative, and second, that there may exist very substantial reasons why this town of two thousand should not create sewer districts. But the additional important observation is that such a tax imposed upon the entire City, even if done through the device of sewer districts for district sewers, is really and truly a general assessment or general tax and under the constitutional limitation of any general tax. Respondent would advise that where a city is cut off from constructing certain improvements on the deferred obligation basis by the constitutional limitations against indebtedness, and where it is cut off from building it out of its tax levies, either because the general limitation of tax levy provides insufficient funds, or (if a sewer system be included under "public buildings") because the voters refuse to give a two-thirds approval, then the City by simple vote of the

board of aldermen can turn to the plan of throwing the whole City into a sewer district and building the sewer upon a special assessment basis.

If the district sewer plan be followed then the method of payment found in Section 7032, R. S. Mo. 1929 (App. A), is provided by an assessment plan in which the total cost of the sewer is apportioned "against the lots, tracts, or parcels of ground, exclusive of improvements, in proportion to the area of the whole district, exclusive of public highways." If it be said that this method of taxation, even though the assessment be spread over the entire City, is not a general tax, then we are face to face with the fact that we propose to transfer from one group of taxpayers to another the burden of compliance imposed upon the first group. Moreover, such an assessment against land on an area basis could only be legally justified in the event the tax could be sustained as a financial benefit to the land.

The present system is already a public sewer built as required for a public sewer, "along the principal courses of drainage." Respondent does not disclose, and the statutes do not provide, authorization for changing a public sewer into a district sewer. Observe that to the contrary *Union Trust Co.* v. *Pagenstecher, Tax Collector, supra,* infers that the district sewer assessment plan has no application to the improvement of a public sewer, 119 S. W. l. c. 1104:

> "The statute under review divides sewers into three classes, *i. e.*, 'public, district and private

sewers.' The tax allowed is only for public sewers, and these are, by the act itself, defined to be such as 'shall be established along the principal courses of drainage,' showing that the purpose was to pay out of public funds only for such sewers as were of utility to the municipality as a municipality, and not such as were especially beneficial to a particular portion of the municipality. *For other than public sewers,* the succeeding sections provide the manner of payment. District sewers must be paid for by special assessments against the property within the district (citing district sewer statute, see App. A). Private sewers must be paid for by the individual (citing private sewer statute.)"

(d) GENERAL REVENUE: At this point we meet respondent's insinuation against our conclusion of law and fact that the City has a general revenue income of approximately $6,000.00 a year. The last official property valuation that had been completed at the time of the trial was that testified to by the witness, at the bottom of page 101 of the record, as the valuation made on June 1st, 1928, to-wit, $1,224,118.00. Fifty cents on the $100.00 valuation of this amount is $6,120.59. And the witness further testified that a substantial portion of these taxes was uncollectible (R. 102) and also that it required the entire City's income for the City's ordinary current expenses (R. 112).

But if we come now to Section 7276, R. S. Mo. 1929 (P. 13), invoked at this point by respondent, we find first that this section was not in existence at the time the sewer in question was built and its character as a permanent or temporary nuisance settled.

Even now, as pointed out in our original petition and brief herein (P. 8, 50), the requirement would be approximately $4,500.00 a year for an additional sewer plant. In addition to the witness' statement (R. 112), that the entire annual revenue of $6,000 is required for ordinary revenue purposes, there is the financial statement of the City's affairs (R. 102-107), in verification.

Balanced Equities.

Petitioner advances no further comment except to refer to the final citation, its quotation and voluminous citations terminating the discussion herein (pp. 50-51) of permanent and temporary nuisance.

Conclusion.

Petitioner respectfully submits that the nuisance in question is a permanent nuisance because of its physical character and because it may not be discontinued without serious impairment of the public welfare, and that the decree in effect undertakes to command the exercise of legislative power which it may not rightfully do, and that such decree makes financial requirements of the City beyond the latter's constitutional powers to comply; and that therefore said decree should be set aside and the plaintiff's petition filed in the trial court dismissed, and instructions issued accordingly to the United States Circuit Court of Appeals for the Eighth Circuit.

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APPENDIX.

Reference has been made in the course of these briefs to the city's building the disposal plant in question by a district sewer assessment, and for that purpose the full provision of the statute governing that matter is set out herewith.

Also, frequent references are made to Sections 11, 12 and 12-A of Article X of the Constitution of Missouri. An abridgment of these provisions of the Constitution, covering what petitioner thought were all possible points of consideration, was included in petitioner's original brief herein, pages 9-11. To make entirely certain that no matter included in those sections, that might be considered of any importance, is omitted from convenient access to the court, the same are set out here in full.

A.

Section 7032, R. S. Mo. 1929:

"DISTRICT SEWERS—HOW ESTABLISHED—CERTIFIED TAX BILLS SHALL BECOME DUE AND PAYABLE, WHEN—HOW PAID.—District sewers shall be established for the districts created to be prescribed by ordinance, and shall connect with the public sewers or other district sewers or with the natural course of drainage as each case may be, and may be constructed with the main branch or discharge pipe wholly within or beyond the boundary of the district, as the board of aldermen shall determine. Such district may be subdivided, enlarged or changed by ordinance at any time previous to the

construction of the sewers therein; and more than one district sewer may be laid in a sewer district if deemed necessary by the board of aldermen for sanitary or other purposes. The board of aldermen shall cause sewers to be constructed in each district whenever a majority of the resident property holders therein shall petition therefor or whenever the board of aldermen shall deem such sewers necessary for sanitary or other purposes, and said sewers shall be of such dimensions and materials as may be prescribed by ordinance, and may be changed, enlarged or extended, and shall have all necessary laterals, inlets, catch basins, manholes and other appurtenances. As soon as any district sewer shall have been completed the city engineer or other officer having charge of the work shall compute the whole cost thereof and shall apportion the same against the lots, tracts or parcels of ground, exclusive of the improvements, in proportion to the area of the whole district exclusive of public highways, and such officer shall report the same to the board of aldermen by bill or otherwise and the board of aldermen shall thereupon levy and assess a special tax by ordinance against each lot, tract or parcel of ground within the district in the name of the owner or owners thereof. Whereupon the city clerk shall make out a certified tax bill under the seal of the city of such assessment against each lot, tract or parcel of ground within the district in the name of the owner or the owners thereof. Said certified special tax-bill shall be signed by the mayor and attested and recorded by the city clerk and shall be delivered to the contractor for the work, who shall proceed to collect the same by the ordinary process of the law in the name of the city to his own use and in case of absent owners he may sue by attachment or by any other process known to the law. Such certified tax-bills shall become due and payable thirty (30) days after the date of

issue thereof, unless the owner of the property described therein shall have filed a written request with the city clerk, prior to the acceptance of the work by the city, that his tax-bill or bills shall be made payable in installments, in which event such special tax-bill shall be payable in annual installments as follows: One-fifth in one year, one-fifth in two years, one-fifth in three years, one-fifth in four years and one-fifth in five years after the date of their issue. The whole of any such special tax-bill made payable in installments may be paid at the date of any installment payment: *Provided, however,* that if any installment is not paid when the same becomes due the remaining unpaid installments shall, at the option of the holder of the tax-bill, become immediately due and payable. Every such certified tax-bill whether the same be made payable in installments or not, shall bear interest at the rate of eight per centum per annum from thirty days after the date of issue until paid, and shall be a special lien against the property described therein for a period of five years from its date, except when made payable in installments, when the special lien shall for a period of one year after the date of the last installment payment shall become due. Every such certified tax-bill shall on action brought to recover the amount thereof be *prima facie* evidence of the validity of the charges against the property therein described and of the liability of the person or persons therein named as the owner or owners of such property. (R. S. 1919, Section 8483. Amended Laws 1921, p. 503.)"

B.

Constitution of Missouri, Article X, Section 11:

"RATES FOR LOCAL PURPOSES—LIMITS—HOW INCREASED FOR SCHOOL AND ERECTING PUBLIC BUILD-

INGS—ST. LOUIS MAY LEVY AS IF PART OF A COUNTY.—Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. For city and town purposes the annual rate on property in cities and towns having thirty thousand inhabitants or more shall not, in the aggregate, exceed one hundred cents on the one hundred dollars valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; and in towns having one thousand inhabitants, or less, said rate shall not exceed twenty-five cents on the hundred dollars valuation. For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, the aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hun-

dred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for state and county purposes, and the rate allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the state, or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness: Provided, That the City of St. Louis may levy for municipal purposes, in addition to the municipal rate of taxation above provided, a rate not exceeding the rate which would be allowed for county purposes if said city were part of a county."

C.

Constitution of Missouri, Article X, Section 12:

"Municipal Indebtedness, Limit of—How Increased—Exceptions as to Certain Cities.—No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such

year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special: Provided, That with such assent any county may be allowed to become indebted to a larger amount for the erection of courthouse or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein; And Provided Further, That any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same: And Provided Further, That the corporate authorities of the City of St. Louis are hereby authorized to issue interest-bearing bonds

of said city in the amount of five million dollars, at a rate of interest not to exceed four per cent per annum, the principal payable within thirty years from the date of their issue, and the proceeds thereof shall be paid to the corporation organized for the celebration of the Louisiana purchase centennial in said city, to be used by said corporation for said celebration, holding a world's fair or exposition in said city. And said corporate authorities of St. Louis shall be repaid as large a proportionate amount of the aid given by them as shall be repaid to the stockholders of said corporation on the sum subscribed and paid by them, and any surplus remaining from the assets of said corporation after said stockholders and said city shall have been paid in full, shall be divided between said stockholders and said city in proportion to the aggregate amount of said stock so paid in and the amount so loaned by said city; and any amount so received by said city from said corporation shall be paid into the sinking fund of said city for the redemption of its outstanding bonds: Provided, That if, at the election for the adoption of this amendment to the Constitution, a majority of the votes cast within the limits of said City of St. Louis voting for and against this amendment shall be against its adoption, then no bonds shall be issued under this amendment; And Provided Further, That no such indebtedness so created shall be in any part thereof paid by the state or from any state revenue, tax or fund, but the same shall be paid by the City of St. Louis alone. Provided, That in the City of St. Louis the amount of bonds now aggregating $6,111,000, that being the amount assumed by said city in the scheme of separation from the County of St. Louis, and the sum of $5,808,000 heretofore prior to January 1, 1901, expended in the construction of waterworks for the City of St. Louis and any bonds which may be hereafter issued by said city in the construction

and improvement of waterworks, the payment of the interest whereon and the principal whereof shall be provided from the revenues of said waterworks; that is to say, the amount of said bonds which shall be outstanding at the time shall not be included in the computation of the existing bonded indebtedness in determining the amount of bonds authorized to be issued by said city with the assent of two-thirds of the voters under the provisions of this article, but said city shall be authorized at any time to issue bonds, with the assent aforesaid, to an amount, including outstanding indebtedness, other than that above named, to the amount of ten per cent of the value of the taxable property in said city, to be ascertained as above provided, and said city shall have power, with such assent of the voters, to issue bonds for the construction and improvement of waterworks, the interest whereon and the principal whereof shall be provided for from the income of said waterworks. Said city shall establish a sinking fund for the payment of the bonds so authorized according to the times fixed for the maturity of the same. Provided, Further, That any city which now has or may hereafter attain a population of seventy-five thousand or more inhabitants may acquire, by purchase, condemnation or construction, waterworks, gas works, electric light works, street railways, telegraph and telephone systems, heating plants, ice or refrigeration plants, or any other plant, system or public service institution, within or outside of the limits of such city, for the use of the city or its citizens, and for the purpose of paying therefor, in whole or in part, may issue public utilities bonds, which public utilities bonds shall not be included in the liabilities or indebtedness of the city limited by the prior provisions of this section; but the total amount of such public utilities bonds to be issued by such city shall not exceed twenty per centum of the

value of the taxable property in said city, to be ascertained as above specified. The principal of said public utilities bonds shall not constitute an obligation of the city enforceable out of the funds raised by taxation. Such city may also issue its bonds, other than public utilities bonds, for the payment, in whole or in part, for such public utilities, and such bonds, other than public utilities bonds, shall constitute a direct obligation of the city, but the total amount of such bonds, other than public utilities bonds, shall not exceed in the aggregate ten per centum of the taxable property therein, as hereinbefore provided, but such bonds, other than public utilities bonds, shall require the assent of two-thirds of all the legal votes cast on that proposition. The ordinance authorizing the purchase, condemnation or construction of such public service plant or system shall provide what portion, if any, of the cost thereof shall be paid by issue of public utilities bonds, and what portion, if any, shall be paid by issue of general bonds of the city, other than public utilities bonds. The principal and the interest of such public utilities bonds shall be paid out of the earnings or sale of the utilities plant or system for the acquisition of which said issue was made, but the city may thereafter provide, by ordinance, for the payment in any year of any part of the interest or principal of said bonds due in that year, out of the general revenue of that year raised by general taxation. Such city shall have power to execute its mortgage or mortgages on any such utility, or any addition thereto, or extension thereof, to secure the payment of such public utilities bonds, and in case of default in the payment of such public utilities bonds, and the interest thereon or interest thereon, said bondholders, or their representatives, may appeal to any court of competent jurisdiction, sitting in the county or city in which such city is located, and said court may, in its

discretion, if said default continue, appoint a receiver to take charge of such property, and such receiver shall operate said property pending such proceeding in such court, and until a final decree of foreclosure in such proceeding, and for a period of one year thereafter, during which period the city may, upon payment to the bondholders of all indebtedness past due, and court costs, and receiver's obligations, retake said property, subject to its unmatured obligations. If said property is not thus retaken by the city in said period of redemption, said receiver shall deliver said property to such party, as the court in such action may order, and thereupon all liability of the city on said bonds shall cease and determine and its rights as owner of said utility or plant shall cease, and determine, and thereafter said utility or plant shall be operated by the party named in said order of courts, or his successors or assigns, in conformity with and subject to the provisions of the ordinance authorizing the acquisition or purchase or construction of said public utility or plant, and the issuance of bonds therefor; but such city shall not issue any such public utilities bonds without the assent of four-sevenths of the voters thereof, voting on that proposition, at an election to be held for that purpose, and such proposition may be submitted at a special election or at a general election, in either of which events if four-sevenths of all of the legal votes cast on such propositions are in favor of the issue of said bonds, the city shall have authority to issue the same. Such utility may be acquired by condemnation proceedings in the same manner that such city may acquire real estate for public purposes, or in such other manner as may be provided by law. Such city may, by a vote of the people in the manner herein provided, take up any public utilities bonds and issue its general bonds in lieu thereof, and may take up any general bonds issued on account

of any public utility and issue public utilities bonds in lieu thereof, whenever there exists such debt-making power of the city as will authorize the issue of such new bonds, but no substitution shall be made without the consent of the holders of such bonds."

D.

Constitution of Missouri, Article X, Section 12a:

"Certain Cities Allowed to Incur Additional Indebtedness for Waterworks, Ice Plants and Light Plants. Any city in this state, containing not more than thirty thousand (30,000) inhabitants, may, with the assent of two-thirds (2/3) of the voters thereof voting at an election held for that purpose, be allowed to become indebted in a larger amount than specified in Section 12 of Article 10 of the Constitution of this state, not exceeding an additional ten (10) per centum on the value of the taxable property therein, for the purpose of purchasing or constructing waterworks, ice plants, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same: Provided, That any such city incurring any such indebtedness requiring the assent of the voters, as aforesaid, shall have power to provide for, and before or at the time of incurring such indebtedness shall provide for the collection of an annual tax, in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty (20) years from the time of contracting the same, any provisions in this Constitution to the contrary notwithstanding."